

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW MEXICO

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AMERICAN PHYSICIANS  
ASSURANCE CORPORATION,

Plaintiff-Counter-Defendant,

v.

DONALD JAMES HAM, M.D.,  
ALAMOGORDO EYE CLINIC, INC.,

Defendants-Counter-Plaintiffs,

and THE ESTATE OF MARTHA  
VALENCIA CARDON, DECEASED, by  
and through Personal Representative  
ELIZABETH ALVAREZ,

Defendant.

No. 1:08-cv-638 PK/ACT

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ORDER

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THIS MATTER comes on for consideration of Plaintiff APA's Motion for Leave to Conduct Additional Discovery and List Additional Trial Exhibits and Percipient and Expert Witnesses filed April 9, 2010. Doc. 311. Upon consideration thereof, the motion is not well taken and should be denied.


APA seeks additional discovery based upon disclosure of a memo (from Michael Dekleva and Rebecca Kenny) concerning an October 19, 2007 meeting between APA representatives and its contract defense lawyers. Doc. 275-3 filed January 29, 2010.

APA argues that it is entitled to additional discovery if the memo is admitted at trial. Doc. 340 at 1-2. The court notes that the magistrate judge denied APA's emergency motion regarding disclosure, Doc. 276, but permitted the depositions of Carl Bettinger, Rebecca Kenny and William Madison. Doc. 315 at 3. APA responds that while the additional discovery "helped mitigate *some* of the prejudice to APA," it "will need to name additional percipient and expert witnesses and exhibits to rebut the memo's new claims and any arguments about the propriety of APA's conduct once those depositions have been completed." Doc. 340 at 5. APA complains that the memo supports different theories than those advanced before and that Dr. Ham and AEC, having obtained consensual leave for additional discovery from the magistrate judge, are hardly in a position to object. Id.

The court is not persuaded. The court has ruled on a related motion in limine involving the October 19, 2007 meeting. Doc. 228; see also Doc. 236 (Pretrial Order) at 20-21, 24 (APA identifying Catherine Shutack and Ann Flood as witnesses concerning the October 2007 meeting). After considering the factors suggested in Smith v. United States, 834 F.2d 166, 169 (10th Cir. 1987), the court will deny all relief requested by APA in its motion. While the court does not condone last minute surfacing of the memo, it is also apparent that potentially relevant issues raised by that memo are hardly new to the case. Trial is imminent, the request is opposed and would delay the trial; more importantly, APA has the tools to defend against the memo (should it be admitted) based upon its witnesses and the discovery that has been allowed.

NOW, THEREFORE, IT IS ORDERED, ADJUDGED and DECREED that Plaintiff APA's Motion for Leave to Conduct Additional Discovery and List Additional Trial Exhibits and Percipient and Expert Witnesses filed April 9, 2010 is denied.

DATED this 12th day of May 2010, at Santa Fe, New Mexico.

  
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United States Circuit Judge  
Sitting by Designation